BANK BUMIPUTRA (M) BHD.

v.

RAMLAH ABDUL MOKTIK & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO. F23-273-1986]
23 AUGUST 1989

CIVIL PROCEDURE: *Application to strike out amended statement of defence - Order 18 r. 19 Rules of the High Court 1980 - Inherent jurisdiction of the Court - Further application for summary judgment - Whether pleadings disclosed reasonable cause of action or defence - Whether action or defence frivolous or vexatious or an abuse of the process of the Court - Reliance on s. 6(1) of the Limitation Act 1953 - When did right of action accrue to plaintiff - Element of interest - Whether in compliance with loan agreement - 2nd defendant - Whether he was notified of variation of interest - Effect of.*

The plaintiff sought to strike out the joint amended statement of defence filed by the 3 defendants. It was alleged that the said defence was frivolous, vexatious and otherwise an abuse of the process of the Court.

Held:

[1] That the defence set out was frivolous and vexatious and was formulated merely to prevent a fair trial of this action and further that the ground of defence set out therein is misconceived.

[2] The evidence clearly indicated that the interest element, charged by the plaintiff, was in compliance with the relevant terms of the loan agreement.

[3] There was however, no evidence to show, that the 2nd defendant had been notified of the variation of the interest rate, and this is a question of law which could not be settled summarily.

[4] No proper demand was made on the 2nd defendant.

[5] From the evidence, it was clear that the plaintiff was not entitled to obtain summary judgment against the 2nd defendant.

[Order accordingly.]

Cases referred to:
Tractors Malaysia Bhd. v. Tio Chee Meng [1975] 2 MLJ 1
Othman & Anor. v. Mek [1972] 2 MLJ 158
Nayar v. Gian Singh & Co. Ltd. [1970] 1 MLJ 176
Mok Hin Wah & Ors. v. United Malaysian Banking Corporation Bhd. [1987] CLJ (Rep) 219

Legislation referred to:
Limitation Act 1953, s. 6(1)(c)
Rules of the High Court 1980, O. 14 r. 1, O. 18 r. 19(1), O. 20 r. 1
Rules of the Supreme Court 1957, O. 70 r. 2

For the plaintiff - Noorzarina; M/s. Abdullah, Abd. Rahman & Co.
For the defendants - Kadariah; M/s. Mahadevi Nadchatiram & Partners

JUDGMENT

Lim Beng Choon J:

In this application, the plaintiff is seeking to strike out the joint amended statement of defence filed by the three defendants in this action. The application is made by way of a summons-in-chambers (encl. 9) pursuant to O. 18 r. 19(1) of the Rules of the High Court 1980 ('the RHC') and the inherent jurisdiction of the Court. Alternatively the plaintiff is asking that summary judgment be entered against the said defendants under O. 14 r. 1 of the Rules of the High Court 1980. However, from the submission of the Counsel for the plaintiff, it is clear that she had abandoned the alternative remedy pegged on O. 14 and chose rather to pursue only the striking out remedy.

There is no doubt that the Court has power to dismiss an action or enter judgment summarily where the pleading discloses no reasonable cause of action or defence or where the action or defence is shown to be frivolous or vexatious or otherwise an abuse of the process of the Court. But such power should be exercised with the utmost caution and it is only in plain and obvious cases that recourse should be had to this summary process - see *Tractors Malaysia Bhd. v. Tio Chee Meng* [1975] 2 MLJ 1.

In the supporting affidavit accompanying the plaintiff's application affirmed by Ahmad Abdul Rahman, the deputy manager of the plaintiff bank, on 13 October 1987 (encl. 8), it was asserted that pursuant to the loan agreement cum assignment executed by the 1st defendant on 5 October 1981 (Exhibit 'A' attached to encl. 8), the plaintiff granted a loan facility to the 1st defendant for the sum of RM124,000. The said deputy manager went on to say that in consideration of the plaintiff having agreed to advance the said facility to the 1st defendant, the 2nd and 3rd defendants executed the letter of guarantee dated 1 April 1982 (Exhibit 'B' attached to encl. 8) by which they agreed to be held jointly and severally liable to the plaintiff for due repayment of the loan of the 1st defendant together with interest. It was then alleged that the 1st defendant was at the commencement of this action 'justly and truly' indebted to the plaintiff in the sum of RM157,118.27 as at 30 September 1986. As regards to the defence filed by the three defendants, it was alleged that the said defence was by its very nature frivolous, vexatious embarrassing or was otherwise an abuse of the process of the Court. Details of the plaintiff's claim were given in its amended statement of claim.

The point of defence as set out in the joint amended statement of defence of the three defendants (encl. 16) may be summarised as follows:

(1) the plaintiff is precluded from pursuing its claim under the statute of limitation since the loan agreement cum assignment was executed on 1 October 1981 ('the loan agreement') that is to say over six years prior to the institution of this action.

(2) as the letter of guarantee was made on 1 April 1982 some six months after the loan was released to the 1st defendant, the said guarantee is therefore void for want of consideration.

(3) the interest charged on the loan by the plaintiff at the rate of 12.5% p.a. is in excess of the agreed interest which under the loan agreement should be calculated at the rate of 11% p.a. At any rate the interest charged on the loan is not only vague and ambiguous but as the plaintiff was charging compound interest as against the loan it is also unconscionable and harsh.

It is also convenient to mention that it is not in dispute that the 3rd defendant, the husband of the 1st defendant, has been adjudicated a bankrupt in the bankruptcy proceeding under Kuala Lumpur High Court Bankruptcy No. 5196 of 1986. In consequence thereof, it has been agreed that the present action against him be stayed pending his Counsel getting instruction from the Official Assignee.

As regards to point (1), I should mention that although the defendants have not stated in their joint pleading or anywhere in their joint affidavits the specific section of the Limitation Act 1953 on which they are relying to support this aspect of their defence, nonetheless it is clear from the manner in which they framed their defence and the assertions deposed by them in their affidavits as well as the submission of their Counsel, that they are in fact relying on s. 6(1)(c) of the said Act which reads:

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued that is to say:
>
> (a) actions founded on a contract or on tort;

There is no dispute (at least there cannot be any dispute) that it was only some time in November 1983 that the 1st defendant committed a breach of the loan agreement when she defaulted in making repayment of the monthly instalment in respect of that month at the prescribed rate of RM1,517.20 per instalment (see para. 8 of the statement of claim). Thereafter she continued to default in her repayment of the monthly instalments and the plaintiff through its solicitors sent a letter dated 25 July 1985 to the 1st defendant demanding payment of the arrears of instalments due from November 1983 to July 1985 (21 months) amounting to RM31,861.20 (RM1517.20 x 21) (see Exhibit 'A' attached to encl. 12). Hence the right of action founded on the loan agreement accrued to the plaintiff only as from November 1983. In *Othman & Anor. v. Mek* [1972] 2 MLJ 158, the late Ong Huck Sim FJ observed that the limitation period would start to run not from the date of the execution of the contract but from the date when a breach was committed. Even assuming that the right of action accrued to the plaintiff as from the date of the execution of the loan agreement that is to say on 5 October 1981, (to which I cannot accede as the evidence cannot support such a proposition) the limitation period would only set in on 4 October 1987. The present action, as stated earlier, was instituted on 25 November 1986, nearly a year before the limitation period had crystalized. How can it be said that the claim of the plaintiff is barred by the statute of limitation? In arriving at this proposition I have not lost sight of the irregularities in the amended writ and the accompanying amended statement of claim. Both the documents were not dated neither were they signed by the solicitors. The Counsel for the defendants therefore, turned to these irregularities and used to support the time barred issue. She submitted that (if I understand her correctly) since the two documents were not dated it is safe for this Court to draw the inference that the amendments must have been made long after the limitation period has crystalized. In the result, so said the learned Counsel, the claim of the plaintiff was 'caught under the Limitation Act 1953'. No case was cited in support of her contention. With due respect, it appears to me to be rather amusing that the learned Counsel should elect to utilise the irregularities to support her time-barred contention instead of utilising them to say that the amendments were void and had no effect. I suppose the learned Counsel knew or ought to have known that had she proceeded to contest that the amendments were a nullity, her time-barred issue would simply crumble as the original writ and the statement of claim would still remain very much alive. However that may be, I am not at all impressed by her contention for the amendments were made in compliance with O. 20 r. 1 of the Rules

of the High Court 1980 and the defendants had not applied to set aside the amendments but chose to amend their defence. Furthermore the amendments were vouched for by the seal of the Court which indicated that the amended writ with the accompanying amended statement of claim was filed on 16 March 1987. The amended writ with the amended statement of claim was also vouched for by the Senior Assistant Registrar who had affixed his or her signature to indicate that the amendments were made pursuant to O. 20 r. 1(1) of the Rules of the High Court 1980 on 2 April 1987 and also to indicate that the amended writ was properly issued. Our Federal Court has decided in *Nayar v. Gian Singh & Co. Ltd.* [1970] 1 MLJ 176 that an amended statement of claim is not a fresh pleading but it is the same proceeding with amendments and therefore it need not be signed by the solicitor of the plaintiffs. In any event the Federal Court in that case also held that the omission to sign an amended statement of claim is only an irregularity which can be cured under O. 70 r. 2 of the 1957 Rules of the Supreme Court. For the above reasons I am satisfied that the defence set out in point (1) above is frivolous and vexatious - it is formulated merely to prevent a fair trial of this action.

As to point (2), I am equally convinced that the ground of defence set out therein is misconceived. It is to be noted that the defendants were merely relying on the assumption that since the loan agreement was executed on 5 October 1981, the disbursement of the loan to the 1st defendant must have taken place on or shortly after that date. The plaintiff, on the other hand, had produced a copy of the letter dated 22 July 1981 written by the plaintiff and addressed to the 1st defendant (see Exhibit 'AAR' attached to encl. 19, the further affidavit affirmed on 16 November 1988 by the head of the credit recovery and monitoring section of the plaintiff bank). By that letter the plaintiff indicated to the 1st defendant that her application for a fixed loan facility had been approved subject to the terms and conditions specified therein. I need only to cite two of the terms and conditions relevant to the defence raised in point (2). It was stipulated firstly that the loan facility was to be additionally guaranteed by two guarantors acceptable to the plaintiff and secondly that the loan was to be released to the 1st defendant after the letter of guarantee had been fully executed and stamped. To show that the loan was released only after these two conditions had been satisfied, the head of the credit recovery and monitoring section of the plaintiff bank had attached the letter of guarantee to his affidavit in support (see Exhibit 'B' attached to encl. 8). By that letter of guarantee, the 2nd and 3rd defendants stated that in consideration of the plaintiff having agreed to advance credit facilities to the 1st defendant up to the sum of RM124,000 they undertook to pay to the plaintiff on demand the principal sum or any part thereof which remained due and unpaid to the plaintiff by the 1st defendant together with interest calculated at the rate of 12% p.a. or at such other rate as the plaintiff might from time to time determine. To fortify the proposition that the loan was released to the 1st defendant in compliance with the terms and conditions set out in the aforementioned letter of offer dated 2 July 1981, the said head of the credit recovery and monitoring section of the plaintiff bank affirmed in his further affidavit (encl. 19) that it was within his knowledge from his checking of the plaintiffs' records that the loan was released only after and execution of the security documents that is to say on 21 April 1982. In the circumstances, no more need to be said about the defence raised in point (2).

As regards to the defence raised in point (3), it is necessary to distinguish and discuss separately this point of defence insofar as it is raised by the 1st defendant, as the borrower of the loan in question and the same point of defence raised by the 2nd and 3rd defendants as the guarantors of the said loan. In the case of the 1st defendant, although it was provided

in Clause (i) of the loan agreement that the 1st defendant agreed to repay the plaintiff the capital sum of RM124,000 with interest thereon based on the rate of 11% p.a., it was however provided in Clause 3(a) thereof that the plaintiff bank was entitled at any time from time to time to vary the rate of interest at its discretion subject to the giving of written notice to the 1st defendant about any such variation. Paragraph (b) of that clause stated that "the decision of the bank as to what at any time is the rate of interest chargeable shall be final and conclusive and shall not be questioned on any account whatsoever." Should the plaintiff vary the rate of interest, Clause 7(b) thereof allowed it to adjust the amount of the monthly instalment repayment or the number of monthly instalments. In para. 11 of the amended statement of claim the plaintiff averred that the balance of the loan sum and interest payable by the defendants as at 30 September 1986 was RM157,118.27 with interest thereon at 4.5% p.a. above the bank's base lending rate of 9.75% p.a. on yearly rest. Notice of the variation of the rate of interest to 14.25% p.a. was given by the plaintiff to the 1st defendant on 8 November 1985 (see Exhibit 'AAR2' attached to encl. 19). Furthermore from my scrutiny of the contemporary correspondence consisting of letters written by the plaintiff to the 1st defendant, her response thereto and letters written by the 3rd defendant her husband, I am satisfied that not only was the 1st defendant duly notified of the variations of the rate of interest, she had never at the material time raised any objection against the said variations (see for instance Exhibits 'A' and 'B' annexed to encl. 12 and Exhibits 'AAR3' and 'AAR4' annexed to encl. 19). Under the circumstances, it is futile for the 1st defendant to allege at this late stage that the interest charges is in excess of the agreed interest or that it is vague and ambiguous or that it is unconscionable and harsh. At any rate apart from her bare allegations, there is no evidence to support her contentions. Indeed the evidence clearly indicates that the interest had been charged by the plaintiff in compliance with the relevant terms of the loan agreement.

The position of the 2nd defendant, however, is quite different. There is no evidence to show that he had been notified of the variation of the interest rate - the letter Exhibit 'AAR2' annexed to encl. 19 mentioned above, was not copied to him. Whether the 2nd defendant was entitled to be notified is a question of law which cannot be settled summarily particularly when Counsel for the respective parties have not addressed me on this matter. Moreover further evidence may be produced by one party or the other to support the case for the defendant or rebut the case for the plaintiff. Another important matter that emerges from the evidence is this. Both the letters of demand (Exhibits 'A' and 'B' annexed to encl. 12) were addressed to the first defendant and copied to the second defendant, with the following statement "both of you are liable jointly and severally as guarantors." It can hardly be disputed that the guarantors were obliged to pay only upon a demand made on them. Now it has been held in *Mok Hin Wah & Ors. v. United Malaysian Banking Corporation Bhd.* [1987] CLJ (Rep) 219 that the respondent as creditor must prove a real demand by sending actual notice of demand to the respective guarantors. It is not sufficient to send to the guarantors carbon copies of the notice of demand meant for the borrower. A proper demand is a condition precedent to suing the guarantors. Applying the principle enunciated in that case to the present case, I do not think that a proper demand had been made to the second defendant of the defaults committed by the first defendant. The remark appearing in the copy of the letter addressed to the first defendant does no more than to warn the second defendant that should the first defendant fail to make payment he as a guarantor might be called upon to pay. That being the case, it is clear that the plaintiff is not entitled to obtain summary judgment against the second defendant.

The order of this Court is therefore this. The application of the plaintiff to strike out the defence of the first defendant is allowed but his application to do otherwise to the defence of the second defendant is dismissed. The application of the plaintiff against the third defendant is stayed.

I shall hear both Counsel on the question of costs.

Also found at [1990] 1 CLJ 761